

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CARLOS M.,

Claimant,

and

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2011051036

DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Bakersfield, California, on July 13, 2011.

Jeffrey F. Popkin, Associate Director, represented Kern Regional Center (Regional Center or Service Agency).

Claimant was represented by his mother, Rocio D.¹

Oral and documentary evidence was received at the hearing. The record was left open for Claimant's mother to submit additional evidence. On July 25, 2011, Service Agency submitted two documents directly provided to it by Claimant's mother: a Notice of Action from Kern County Mental Health Department and a prescription from Elsa T. Lavadia, M.D (Lavadia). Service Agency has no objection to the receipt into evidence of the documents provided by Claimant's mother. The entire packet of documents, including the transmittal letter and facsimile transmission cover page has been marked and received into evidence

The matter was submitted for decision on July 25, 2011.

¹ Initials have been used to protect the privacy of Claimant and his family.

ISSUE

Is Claimant eligible for Regional Center assessment services pursuant to the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code² section 4500 et seq. (Lanterman Act)?

FINDINGS OF FACT

1. Claimant is four years and ten months old, and resides with his parents and his three-year-old sister.

2. Claimant was a Service Agency consumer as part of the Early Start program, until he turned three years old. On September 17, 2006, Service Agency concluded that there was no evidence of autism, cerebral palsy, or mental retardation, and that his seizure disorder was not substantially handicapping.

3. Claimant has a history of seizures. He began having seizures at nine months of age, when he was hospitalized for one week due to hourly seizures. During the winter of 2009, Claimant had a total of five hospitalizations due to repeated night-time seizures. His pediatrician, Dr. Lavadia, referred him to out-of-town specialists for evaluation and treatment.

4. On September 23, 2010, Claimant was seen at the Neurology Clinic at Children's Hospital Central California (Children's Hospital), in Madera, California. Jane Donat, M.D. (Donat), noted that seizure control had increased during 2010. Claimant's family reported isolated night seizure episodes, the last of which had occurred six months before. Developmental milestones were reported as delayed. Claimant did not have individual words other than "mom" or "ma." Dr. Donat ordered blood tests and continued to prescribe Valproic acid to treat the seizures.

5. Claimant returned to Children's Hospital on January 18, 2011, and was seen by Raymund David, M.D. (David). Since the prior visit, Claimant had had three seizures, all on January 1, 2011. While he was sleeping on January 1, 2011, Claimant experienced generalized shaking of his upper and lower extremities with upward rolling of the eyeballs that lasted for two to three minutes. Dr. David's diagnostic impression was "Epilepsy and developmental delay, most likely related to neonatal encephalopathy." (Exhibit 6, at p. 2.) Dr. David continued to prescribe Valproic acid, 22 milligrams per kilogram per day, and added lorazepam in the event of seizures, as needed. Dr. David recommended evaluation by a school psychologist for reported aggressive behavior.

6. Dr. David's report was provided to Service Agency, but the agency's physician consultant did not deem the information sufficient to alter Service Agency's prior determination.

² All further references are to the Welfare and Institutions Code.

7. The Bakersfield City School District (District) conducted a psychoeducational assessment and prepared a report dated July 7, 2009. Claimant did not complete enough of the tasks on the instrument utilized to determine cognitive ability, the Battelle Developmental Inventory, for the District to measure cognitive ability. District staff evaluated Claimant's adaptive functioning based on his mother's report, which functioning was assumed to be consistent with cognitive development. His cognitive ability was deemed to be in the average range. Claimant's personal-social skills were found to be at age level, based on mother's report. Motor skills were also found to be at age level.

8. a. In a separate speech and language assessment, District staff concluded that Claimant presented with communication impairments that warranted special education services. In the latest Individualized Education Program (IEP) plan, prepared after a meeting on September 1, 2010, Claimant's "Primary Disability" is listed as "Other Health Impairment," and his "Secondary Disability" is listed as "Speech/Language Impairment." (Exhibit 8, at p.1.) The IEP states: "Due to displayed expressive/receptive language skills falling below average range, Carlos requires mild to moderate placement for successful development of preacademic/readiness, social, and language skills." (*Ibid.*)

b. Regarding preacademic/functional skills, the IEP states: "Carlos will attend in small group for short periods of time to highly preferred activities but [loses] focus quickly if the activity is not directed to gain his attention or an adult is not available to redirect him. He does take turns during small group activities after being prompted initially. When his focus to task is good, Carlos is able to follow simple directions as well as complete some labeling tasks given" (Exhibit 8, at p.2.)

c. In the area of communication, the IEP states: "Carlos has very little intelligible speech and thus causes his functional communication to be extremely limited. Regardless of his lack of ability for meaningful communication, Carlos is not, however, deterred from initiating interactions with [peers] and adults. Given his language delays, more substantial behavior deficits would be expected, however, only occasional outbursts (or fits) are displayed as a result of frustration or inability to communicate his needs." (Exhibit 8, at p. 3.)

d. With respect to self-help, it is noted that "Carlos is not yet toilet trained and continues to wear pull-ups/diapers. He rarely and inconsistently indicates a need to use or be toileted. He pulls down his own clothing but cannot yet refasten buttons and/or snaps. At meal times, breakfast and lunch, Carlos will eat independently by use of finger feeding and some spoon feeding when reminded. He washes his hands to age expected standards and cooperates during washing." (Exhibit 8, at p. 3.)

e. In a section entitled "Areas of need to be addressed in goals and objectives for student to receive educational benefit," it is stated: "Global delays in multiple areas affecting readiness and pre-academic skills as a result of the lack of development of communication skills." (Exhibit 8, at p. 3.)

9. Claimant's mother confirmed many of the observations of teachers and other District staff. Claimant does not say more than a few words, such as "mom," "dad," and "water." He is aggressive toward his sister and others, hitting and pulling their hair. He appears to be developmentally behind his younger sister and a cousin of the same age. He is not toilet-trained. His last seizure occurred about three months ago, but there were multiple seizures at the time.

10. On May 12, 2011, the Kern County Mental Health Department determined that Claimant was not eligible for services from that agency.

11. On May 9, 2011, Service Agency informed Claimant's mother that it was denying her request for an assessment as the evidence received by the agency was not indicative of a developmental disability, and citing section 4642 as the basis for the denial of assessment services. Claimant's mother filed a Fair Hearing Request on May 19, 2011.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is specifically defined as "a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).)

2. "Substantial disability" has been defined as "the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by the regional center, and as appropriate to the age of the person: (1) Self-care. (2) Receptive and expressive language. (3) Learning. (4) Mobility. (5) Self-direction. (6) Capacity for independent living. (7) Economic self-sufficiency. . . ." (Welf. & Inst. Code, § 4512, subd. (l).)

3. Section 4642, upon which Service Agency relied to deny assessment services, states, in pertinent part: "Any person believed to have a developmental disability . . . shall be eligible for initial intake and assessment services in the regional centers. . . ."

4. The evidence presented at the hearing is sufficient to establish that Claimant is "believed to have a developmental disability," as required by section 4642 to warrant intake and assessment services. Physicians at Children's Hospital, including Dr. David, have diagnosed Claimant as suffering from seizure disorder, and are treating Claimant for this condition. While the seizures appear to have improved with treatment, they have not been

sufficiently controlled by medication and remain a significant challenge. Moreover, sufficient evidence points to significant functional limitations in at least three areas of major life activity to warrant further exploration. Thus, Claimant has receptive and expressive language delays, for which he is receiving special education services. These language deficits interfere with his ability to learn, as noted in the IEP. As also noted in the IEP, Claimant lacks self-direction, and requires prompting and adult supervision to remain on task. His self-care ability is significantly impaired as evidenced by his lack of toilet training. Such significant limitations and the fact that educational and medical professionals are already treating Claimant for developmental delays that may be directly related to his seizures demonstrate the need for interdisciplinary planning. In these circumstances, Service Agency is required to provide assessment services that may lead to provide a more definitive answer regarding whether Claimant has a developmental disability.

5. By reason of the foregoing factual findings and legal conclusions, there is sufficient evidence to establish the belief that Claimant has a developmental disability to warrant assessment services from Regional Center.

ORDER

Claimant's appeal is granted.

DATED: July 28, 2011

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.